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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 5

FRANK JAMES LUPPER, ET AL. ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas styled as *Briggs et al* v. *State*, (Appendix of Petition) is reported at 236 Ark. 596, 367 S.W. 2d 750, and the opinion of that Court on petition for re-hearing (Appendix of Petition) is found at 236 Ark. 611, 376 S.W. 2d 760.

JURISDICTION

The jurisdictional requirement is adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Does the Civil Rights Act of 1964, enacted by the Congress of the United States, compel the reversal of these convictions?

II. Is there evidence of policy of any official organ of the State of Arkansas which requires segregation and would constitute "State action" under the Fourteenth Amendment to the constitution of the United States?

III. Does Act 14 offend any constitutional concept?

IV. Does enforcement of a criminal statute pertaining to trespass by criminal prosecution by the State of Arkansas constitute "State action" or is such otherwise violative of the Fourteenth Amendment to the Constitution of the United States?

V. Is the statute under which petitioners were convicted, Act 14, vague or indefinite

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 3, Article IV, Paragraph 2, and the Fourteenth Amendment to the Constitution of the United States.

FEDERAL STATUTES INVOLVED

This case involves the Civil Rights Act of 1964, Title II, 78 Stat. 243-246, quoted in the appendix of petitioners' brief and the federal saving statute, 1 U.S.C., Section 109, 61 Stat. 635, quoted at page 26 of petitioners' brief.

ARKANSAS STATUTES INVOLVED

The issue of this litigation is the constitutionality of Act 14, Acts of Arkansas, 1959, codified as Arkansas Statutes Annotated, § 41-1433 (1963 Supp.) which prohibits a person to remain on the premises of a business establishment after having been requested to leave by the owner or manager of the establishment and is quoted in full in petitioners' brief.

This case also involves the general saving statutes of Arkansas, codified as Arkansas Statutes Annotated, § 1-103 and 1-104, (1947), which are quoted in full in petitioners' brief.

STATEMENT

The petitioners, Frank J. Lupper, and Thomas B. Robinson, were prosecuted and convicted for a trespass which occurred at a privately owned business establishment in Little Rock, Arkansas. The petitioners were a part of a group of twelve to fifteen persons wearing identifying badges who entered Gus Blass & Company, a department store, between 11:30 A.M. and noon on April 13, 1960. A police officer who was working his beat at Fourth and Main Streets observed the group entering the store and recognized Robinson as a demonstrator. Several business establishments had previously suffered similar demonstrations during the preceeding weeks, and much notoriety of continuing demonstrations had been given by the sponsoring organizations. The group proceeded to a mezzanine tea room where they took chairs strategically placed themselves at the counter and at tables across the entrance. The tea room occupies a rather small area and caters mostly to women patrons, serving light lunches, congealed salads, and the like.

Within a few minutes, both petitioners, as well as some of the other remaining members of the group were courteously advised by store officials, the manager and assistant superintendent, that Blass reserved the right to refuse service to anyone and was not prepared to serve petitioners at that time. The petitioners were then requested to leave. No reference was made to race or discrimination. Although petitioners were not boisterous and were neatly dressed, they attempted to question and argue with the store personnel and refused to leave the premises.

After each of the petitioners had defied the requests to leave, the manager left the store and proceeded to Worthen Bank and Trust Company, located diagonally across the street from Blass, found two police officers and asked their assistance. The petitioners were apprehended on the first floor and readily admitted to the police officers the entire incident. These admissions were denied at the trial.

The petitioners were tried and convicted of the offense in the criminal division of the Little Rock Municipal Court. The convictions were appealed to the Pulaski Circuit Court where a trial *de novo* by jury resulted in verdicts of guilty. The Arkansas Supreme Court affirmed the convictions and subsequently denied the applications for rehearing.

The petitioners staunchly denied, during their testimony at trial, that they were peacefully protesting racial discrimination. It was intimated that pure happenstance found so many Negroes at the tea room for lunch on the same day. None of the petitioners admitted acquaintance with any of the others in the group. Their brief on

appeal to the Arkansas Supreme Court denied any concerted group operation. Now, it is finally admitted before this Court that the petitioners' actions were a part of a sit-in demonstration.

SUMMARY OF ARGUMENT

Perhaps this case has the dubious distinction of possessing the precise factual circumstances, absent the confusing aspects discovered in similar cases, which will permit this Court to determine the application of the Fourteenth Amendment to so called "sit-in" demonstrations in violation of state statutes governing trespass of private property. This litigation was not the result of a clever plan to snare unwary victims contrived by the State of Arkansas, law enforcement officials, or the manager of Blass Department Store. Nor was this incident a carefully devised test suit to determine the application and validity of a state statute. These petitioners were not youthful strangers seeking to satisfy a pain of appetite. Rather, these petitioners were local, mature, and sophisticated men attending a church and community supported college. These petitioners were well organized, well informed, but perhaps ill advised. They and their cohorts had been educated by experience as to the consequences of their unlawful acts. Their avowed and accomplished purpose was to create civil disobedience and violate existing State laws. They did so in an imprudent but effective manner. The fact that they and the others with them may have become precariously near to causing personal injury, property damage or both was of no concern or, at the most, incidental.

I

As a matter of law, the Civil Rights Act of 1964, does not operate to abate these prosecutions. That legislation is, by expressed terms, to operate in the future. There is no hint, much less authority, for retroactive application. Title II, § 2; *Hall* v. *Maryland*, 378 U.S. , 12 L. Ed. 2d 822. For whatever it is worth, the State of Arkansas has typical saving statutes which have been consistently interpreted. Ark. Stat. Ann. §§ 1-103 and 1-104 (1947); *Volmer* v. *State*, 34 Ark. 487 (1879). There has been no action taken by the General Assembly of Arkansas to enact a public accommodation law.

What is more important, there is no evidence whatever that a mezzanine tearoom which serves a luncheon and caters almost exclusively to women patrons would be governed by the act. Here, there is no question of transient guests or accommodation to a traveling public in the traditional innkeeper connotation. Title II (b) (2). Likewise, there is no evidence that petitioners were requested to leave the tearoom on account of race, color, religion, or national origin. Title II, § 201. (a).

In conclusion, the federal savings statute would dictate a continuing life to these prosecutions. 1 U. S. C § 109.

II

The record in this case is void of the traditional and recently recognized indicia of state action which would constitute a violation under the Fourteenth Amendment to the Constitution of the United States. There is a complete absence of evidence that there was a state statute, city ordinance, or a regulation of any governmental agency which would expressly or tacitly require segregation in restaurants. It is doubtful that the lack of evidence

may be accredited as an oversight. If anything, municipal and state government have established a free atmosphere where all of its citizens are unfettered to associate with whom they please. There is no evidence of past or present discriminatory practice in the business community or by Gus Blass & Company. Incidentally, the store manager was originally from Chicago and had been a resident of Arkansas for less than six months.

The history of Arkansas, especially in recent years, confirms that it is a government dedicated to neither integration nor segregation. A perusal of the few reported cases on the subject reveals that leading citizens, organizations, members and officers of city government including municipal police, have protected the rights of Negroes without disparity.

Finally, the procedural rules of the State of Arkansas would prohibit consideration of this matter by this Court. *Edelman* v. *California*, 344 U.S. 357.

III

Act 14 does not offend any constitutional concept, but on the contrary, compliments the constitutional rights of property and the individual. *Martin* v. *Struthers*, 319 U.S. 141. The constitutions of this Nation and the State of Arkansas are cognizant that the right of property is before and higher than any constitutional sanction. Ark. Const. Art. II, § 22. These broad and fundamental principles cannot be termed "narrow".

Although the facts in this case remove the tea room from the traditional innkeeper connotation, the common law did envision the right of a proprietor to eject those who may injure his business. Waterman, "A Treatise on the Law of Trespass." Vol. 1, § 174 (1875).

The authority supporting the right of Blass department store is overwhelming.

The petitioners were permitted to peacefully demonstrate briefly, but the store was not constitutionally required to furnish facilities for a public forum of marathon proportions. Cf. *Gibonev* v. *Empire Storage & Co.*, 336 U.S. 490.

IV

A. The mere aid of state criminal process to enforce Act 14 does not constitute state action in contravention of the Fourteenth Amendment. Ejection of petitioners was the choice of the manager. It is presumed that the officers acted in good faith. Ark. Stat. Ann. § 41-1435 (1963 Supp.); *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350. The action of the officers was not repugnant to equal protection.

The use of law enforcement officials and the courts do not amount to "State action". Cf. *Shelley* v. *Kraemer* 334 U.S. 1; *The Civil Rights Cases*, 109 U.S. 3.

B. The Fourteenth Amendment alone would not nullify the application of Act 14. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *United States* v. *Cruikshank*, 92 U.S. 542. Such an enlarged interpretation would apply with equal zeal and logic to a civil action for trespass. A property owner would thus be deprived of any judicial forum to seek and determine his remedies. The abstinence of jurist for the past nine decades to increase the application of the Amendment was both purposeful and meaningful. Neither the legislative history of the Amendment, nor the decisions of various courts support petitioners' contentions.

The Act under consideration cannot be considered to be vague or indefinite. Ark. Stat. Ann. § 41-1433 (1963 Supp.). It clearly and concisely declares what constitutes a criminal trespass in unequivocable terms and ordinary language. *Briggs, et al., v. State*, 236 Ark. 596, *supra*. There is absent the confusing aspect of forewarning found in *Bouie* v. *The City of Columbia*, 378 U.S. , 12 L. Ed. 2d 894. The requests to leave the premises were clear and unqualified and required immediate obeyance. *Crouch* v. *Ringer, et al.*, 188 P. 782. There was no deprivation by the private owners of a brief peaceful demonstration by petitioners and their group. There was a prolonged and defiant confrontation of the private perrogative of who shall compose the clientele of a business establishment.

ARGUMENT

I

The enactment of the Civil Rights Act of 1964 has no retroactive effect on these convictions.

The initial proposition presented by petitioners is that the recent enactment of the Civil Rights Act of 1964 requires abatement of these prosecutions as a matter of federal law. Of course, petitioners would be delighted to dispose of these cases in such a perfunctory manner and avoid the square meeting of the true crucial issue involved in this litigation. Perhaps this fact above all others demonstrates petitioners' ominous realization of the weakness of their contentions.

It will be decisively shown that petitioners cannot find comfort in the Civil Rights Act of 1964 to escape the bitter fruits of their crimes.

Presupposing that the Civil Rights Act of 1964 is constitutional, petitioners recite what could be the pertinent provisions of Title II of the Act popularly known as the accommodations section, and indulge in an *ad hominem* interpretation. It is concluded that, "It is clear . . . . " that Gus Blass & Company would be governed by the Act (p. 20 of Petitioners' Brief). This deduction ignores the expressed qualifications and definitions contained in the Act and is constructed without the benefit of a foundation of fact. What meager information can be gleaned from the record sustains only that the tea room occupied a small area on the mezzanine that serves a luncheon to patrons (R.41, 46). It is then gratutiously stated that "It is unthinkable that a State should be permitted to punish disobedience . . . " when Section 203 (c) of the Act now prohibits punishment (pp 21, 22 of Petitioners' Brief).

There is one critical fact distinguishing this case from all of the others presented to this Court. There is the total void of testimony or even the inference that petitioners were ordered to leave on account "of race, color, religion, or national origin." Title II, § 201 (a). Parenthetically, Act 14 not only makes no distinction of the race of the intruder, but declares the duty of peace officers to act without regard to race, sex or age. *Briggs et al* v. *State*, *supra*, 236 Ark. 596; § 3, No. 14 Acts of Ark. 1959, codified as Ark. Stat. Ann. § 41-1435 (1963 Supp.)

The sole reason expressed by the officials of Blass was that they were not prepared to give petitioners service at that time. This answer apparently satisfied petitioners trial attorneys for it was not pursued, but permitted to stand uncontradicted (R.42). The only hint of disagreeance was a supposition by Robinson on cross examination (R.66).

Respondent offers the challenge to discover one scintilla of evidence of racial discrimination in the record which was so tediously planned from the very staging of the demonstration to the presentation of this cause at this time.

As suggested previously, it may well have been the unusual phenomena, if it may be called that, of a large group of college men and their companions invading the tea room that caused the manager's reaction to refuse them service. Whatever the undisclosed reason, it is doubtful that the Civil Rights Act of 1964 could be successfully invoked under these circumstances.

With these factual issues settled, a concise study of the legal authority is now in order.

The petitioners, by a circuitous argument, urge that that federal provision defining the status of existing liabilities after repeal of a statute would not require a continuance of these prosecutions. 1 U.S.C. § 109. It hardly needs emphasis that a federal enactment supercedes a conflicting state statute. U.S. Const., Art. VI, § 2. It is expressly included in the Act. Title XI, § 1104. It is still impossible to reach petitioners' objective.

The vital question here is: Does the Civil Rights Act of 1964 retroactively invalidate these prosecutions? The answer is obviously in the negative. The petitioners initially admit this, but then by energetic efforts attempt to show otherwise. This is certainly laudable, but unavailing. The intent of Congress is clear and cannot be made the subject of wistful interpretation. The attention of the Court is invited to its most recent pronouncement on the subject. In *Bell* v. *Maryland*, 378 U.S. , 12 L. Ed. 2d 822, there was persuasive influence that the Maryland Court in *Beard* v. *State*, 74 Md. 130, 21 A. 709, had held that the use of the word "shall" rather than the word "is" disclosed that the obvious intention was not to interfere with past offences but merely to fix a penalty for future ones. It should suffice to note that the prohibitive provision, § 203 of Title II is perfaced with the phrase, "No person *shall* . . . " (Emphasis supplied.)

No more need be said, but petitioners' unfounded conclusions demand added response. The Arkansas saving statutes, Ark. Stat. Ann. §§ 1-103 and 1-104 (1947) have been interjected by petitioners into this case with some curiosity. It is certainly questionable that these statutes are applicable in this litigation. There is nothing in Act 14 which offends the Civil Rights Act of 1964. There

is no revision or amendment of Act 14 made imperative by the federal enactment. What is truly remarkable is that petitioners have not been so bold to urge that Act 14 could have conceivably been repealed by the Civil Rights Act of 1964. Assuredly, if the owner of an establishment identified by the Civil Rights Act of 1964 *were* to refuse an accommodation *on* the basis of race and instituted prosecution under the authority of Act 14, this would *now* result in an unconstitutional *application* of Act 14. None of the ingredients can be discerned from this record much less proven. The mere allegation of discrimination brought forth by petitioners' motions to dismiss (R.7-13) to the trial judge must be proven, not presumed. *Carter* v. *Texas*, 117 U.S. 442 (1900); *Tarrance* v. *Florida*, 188 U.S. 519 (1903). And petitioners have shunned this burden.

Conceding *arguendo* that the confusion concerning the operation of Arkansas saving provisions expressed by petitioners are real and not contrived, they are ready answers. The courts of Arkansas have voiced uniform interpretation of its saving statutes. *Volmer* v. *State*, 34 Ark. 487 (1879). This interpretation is consistent with the general rule. 1 Southerland Statutory Construction, 3d Ed., § 2047. There is no divergence from the rule in Arkansas where there is an amendment by partial re-enactment. *Lawyer* v. *Carpenter*, 80 Ark. 411, 97 S.W. 662 (1906).

At this point, respondent reaches an agreement, at least in part, with petitioners that a remand of these cases would not reap any valuable benefits. To reiterate, there is not even a remote conflict of Act 14 with the Civil Rights Act of 1964. Futile efforts should not be encouraged. *Fay* v. *Noia*, 372 U.S. 39 (1963).

II

Neither the State of Arkansas nor the City of Little Rock officially or otherwise requires segregation of races in restaurants.

It is petitioners' contention, set forth at Point II A of their brief, that the State of Arkansas, its citizens and its state and local governments are to be condemned for sanctioning racial discrimination and supporting racial segregation in the form of state law and policy. Support for this assertion is founded upon a comment of the Governor of Arkansas made in 1959 concerning segregated public schools and reference to certain statutes. Of course, one of petitioners' Negro attorneys was attending a state intergrated school as early as 1951, but no mention of this was made in the brief. Furthermore, there is no segregation on railroads, in waiting rooms or in the two race tracks existing in Arkansas. There are no street cars operating in this State. There are no segregated buses and those schools which may have not yet intergrated necessarily have the approval of the federal judiciary. Chain gangs are unknown. The division by race and sex of prisoners in penal institutitions is preferred by penologist.

Conspicious by absence is the failure of petitioners to show any license or franchise held by Blass from any governmental agency. Nor was there a showing that the State of Arkansas or any municipality has any provision, expressed or implied, which requires segregation in restaurants. Again, it is doubtful that this lack of evidence maybe accredited as an oversight by petitioners or their attorneys. No effort to solicit such testimony or otherwise introduce evidence was made simply because it was not available or true.

The history of Arkansas, especially in recent years, confirms that it is a government dedicated to neither segregation nor intergration. There exists a free atmosphere, not found in a "slave" state, where its citizens are unfettered one way or the other by State statutes and may associate with whom they please. To be sure, Little Rock experienced a dreadful controversy which was resolved, not only in the State and federal courts, but by the people of the community as well. There is no comparison, however, in the small number of disorderly persons involved in the school incident and the large group of demonstrators who invaded the downtown merchants. In fact, the crowds at Little Rock Central High School including curious bystanders are comparatively insignificant when related to the masses involved in the racial strife and unrest in New Jersey, Chicago, New York, Cicero and Philadelphia to mention but a few. How can petitioners say that the State and local government have promoted segregation? Only brief reference need be shown to disclose that leading citizens, organizations, members and officers of the city government including municipal police have protected the rights of Negroes and incurred the wrath of a few radicals. *Perry et al.* v. *State*, 232 Ark. 959, 342 S.W. 2d 95 (1961); *Lauderdale* v. *State*, 233 Ark. 96, 343 S.W. 2d 422 (1961). There were criminal prosecutions to the limit of the law by both the State and city government. Those demonstrators also claimed deprivation of their constitutional rights. *Lauderdale* v. *Smith*, 186 F. Supp. 958, (E.D. Ark. 1960); *Pritchard* v. *Downie*, 201 F. Supp. 893 (E.D. Ark. 1962), aff. 309 F. 2d 634 (8th Cir. 1962); *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961). The Supreme Court of Arkansas has impartially administered justice to those who attempted to make profit from emotions no matter the color of the litigants. *Monts* v. *State*, 233 Ark. 816, 349 S.W. 2d 350 (1961). Who

demands repentance for Arkansas? Respondent demands a contrary showing of atmosphere be made other than the general phrases of condemnation which have been illustrated to be fallacious.

The record in these cases is absolutely clear that there was no policy of racial discrimination by Gus Blass & Company or that it was aware of or concerned with the empty statutes which require segregation of races on chain gangs, street cars and the like. What is more, there is no evidence of racial discrimination in the rest of the business community.

Nothing worse can be said of the store manager. Again, the record is clear. Mr. Holt had held this position and had been a resident of Arkansas for less than six months (R.45). He was not the product of a "slave" state, but was from Chicago (R.45). It is certainly questionable that Mr. Holt had been indoctrinated to the "historic social prejudices of the South" in such a short period of time. If he was, his testimony most assuredly does not represent it. Consider also that there was no suggestion that Mr. Holt was a hostile witness. Cf. *Bell* v. *Maryland*, *supra*, Appendix II, concurring opinion, 84 S. Ct. at 1839. Surely this Court will not punish property owners in Arkansas and deny them the right to protect their business investment and livelihood simply for certain obsolete and aged enactments by the General Assembly. *Bell* v. *Maryland*, *supra*, dissenting opinion, 84 S. Ct. at 1873; cf. *McKibbin* v *Michigan Corp. & Securities Comm.*, 369 Mich. 69, 119 N.W. 2d 557 (1963).

But these matters just related are purely collateral and except for setting the record straight should not be persuasive in this litigation, for it matters not if Mr. Holt was personally prejudiced or that the corporation which he represented was prejudiced to the persons he

had requested to leave the premises. It matters not that it was the policy or the belief of the manager or stockholders that more profit could be made by operating the department store with the facilities of a tearoom for the convenience of luncheons on the premises for women shoppers on a segregated basis.

There are some who condemn a capitalist economic society, much more the form of corporate enterprise. To this day the business of making a reasonable profit for labor expended or services performed has not been deplored in this country but is ordinarily commendable. The profession of law is perhaps one of the highest callings. Still some judges, most lawyers and with few exceptions, all law clerks expect some remuneration. This is not considered materialism or greed. If it were otherwise, there would be little opportunity to secure those men and women of great wisdom, intellect and ability to consider the most weighty and burdensome of legal problems. It is a virtue that an individual, whether a day laborer or an absentee stockholder, makes a reasonable living, supports his family and nurtures his children spiritually and educationally. These goals, above all others, have attributed to the success of this country, now the mightest nation in the world. Business judgment, whether based on prejudice, exclusiveness, economy or otherwise, should and must be recognized as a legitimate and valuable constitutional right which merits protection by this Court. *Terminal Taxicab Company* v. *Kutz*, 241 U.S. 252; *Marrone* v. *Washington Jockey Club*, 227 U.S. 633.

Finally, petitioners neglected to raise this issue below so that the trial court and the Arkansas Supreme Court might have an opportunity to properly rule on the question. Local procedure in a criminal case requires that objection be made, exception taken, and the matter in-

cluded in the motion for new trial. *Yarbrough* v. *State*, 206 Ark. 549, 176 S.W. 2d 702. Moreover, in a misdemeanor, only issues briefed can be properly considered. *Fields* v. *State*, 219 Ark. 373, 242 S.W. 2d 629; Rules of Ark. Sup. Court, Rule 11 (g). Reasonable procedural requirements created to facilitate the dispatch of justice and to assure finality of litigation have been honored by this Court. *Edelman* v. *California*, 344 U.S. 357; *Brown* v. *Allen*, 344 U.S. 443, 503. Inasmuch as petitioners have failed to comply with the long established rules of the courts of Arkansas, they cannot now interject this matter for consideration by this Court.

III

Act 14 is consistent with all constitutional concepts.

It cannot be successful argued that Act 14 is *per se* violative of the Fourteenth Amendment or is repugnant in any way to the Constitution of the United States. On the contrary, Act 14 is consistent with and lends to the inalienable guaranty of an individual to select whom he desires to associate with in his business and social life.

The State of Arkansas has over thirty statutes prohibiting trespass in one form or another. Although Act 14 is one of the most recent, it does not abbrogate the common law but is rather, a codification of the prevailing rule in this country. Act 14 is also in harmony with statutes of numerous other states. This most germaine and expressive language is found in *Martin* v. *Struthers*, 319 U.S. 141, at 147:

> "Traditionally, the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes

> exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Therefore, Act 14 complements rather than detracts from the supreme law of the land.

Gratefully, respondent is not compelled to exhaustively search, vainly interpret, and ingeniously create authority and reason to sustain its position. The firm foundation supporting Act 14 is readily available, clearly stated, and well established. The authorities are almost too numerous and settled to permit or require reference.

Consider, for a moment, the following excerpts from the Constitution of Arkansas standing bare without the necessity of a clothing of judicial enlargement:

> "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and property, of acquiring, possessing and protecting property . . . " (Article II, Section 2).

> ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law . . . " (Article II, Section 8).

> "The right of property is before and higher than any constitutional sanctions; and private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." (Article II, Section 22).

Almost identical provisions are found in the Constitution of the United States:

> ". . . nor shall private property be taken for public use, without just compensation." (Amendment 5).

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . ." (Amendment 14, Section 1).

Respondent submits that these are not hollow phrases and no amount of strained semantics can alter these broad concepts to a "narrow" principle.

If accolades and praises are sung for our founding fathers and the Fourteenth Amendment, let no discordant note fall on the individual and his property. Hark the individual! Not the minority, nor the majority, the demonstrator, the organization, nor even the assertion of pseudo rights which have been born in the minds of evil men for the sole purpose to injure and destroy others and their property.

In similar cases which have recently been brought before this Court, much has been said of the traditional innkeeper's obligation to accept all guests. Such a comparison here must necessarily fail. First, the facility where petitioners sought service, previously described as a tea room on the mezzanine of a department store located in downtown Little Rock, is clearly distinguishable from the envisioned coach road house or inn. Fourth and Main Streets is not the path of a weary traveler, for state and national highway systems are remotely distant. Railway facilities, bus terminals, and commercial aircraft are not even located in the general vicinity of the store. It is not reasonable to assume that a person would hazard the congested business district traffic and unavailable parking to be a transient guest. Most assuredly, this was not the goal that Blackstone and other ancient legal philosophers intended to secure for the traveling public.

Second, even those eminent authors and jurists, while considering the obligations of the innkeeper did envision the rights of the proprietor now expressly secured by the terms of Act 14. It is stated by Waterman in "A Treatise on the Law of Trespass" (1875) at Section 174, that an innkeeper is not obligated to make his house a common receptacle for all comers whatever may be their character or condition. At Section 175, he states:

> "As an innkeeper is bound to admit travelers under certain limitations. . . . There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guest, the same lawful purpose, comes in a like suitable condition and with as proper a demeanor, any more than he has the right to admit one traveler and exclude another merely because it is his pleasure. *If one came to injure the house, or if his business operated directly as an injury, that would present a different question.* Perhaps there may be cases in which an innkeeper may have a right to exclude all but travelers and those who have been sent for by them." (Emphasis added.)

This Court consistent with those well established principles has held that the public does not mean everybody all of the time. *Peck* v. *Tribune Co.* 214 U.S. 185. An ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes. *German Alliance Insurance Co.* v. *Kansas*, 233 U.S. 389. In *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N.E. 2d 541, 14 ALR 2d 133, cert. den. 339 U.S. 981, it was held that a corporation organized under the New York law to provide low cost housing may constitutionally select its tenants with the right to reject on account of race, color, or religion.

To go one step further, the fact that the private owner may be required to secure a license from the State in order to operate, does not alone prohibit discrimination by the owner, nor does it convert the private facility into a public one. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir.); *Slack* v. *Atlantic White Tower Systems, Inc.*, 181 F. Supp. 124, aff. 284 F. 2d 746; *Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, aff. 183 F. 2d 440 (8th Cir.); *Griffin* v. *Collins*, 187 F. Supp. 149; *Tamelleo* v. *New Hampshire Jockey Club, Inc.*, 163 A. 2d 10 (N.H.); *McKibbin* v. *Michigan Corp. & Securities Commission*, 119 N.W. 2d 557 (Mich.); *Madden* v. *Queens County Jockey Club*, 72 N.E. 2d 697 (N.Y.), cert. den. 332 U.S. 761; *Terrell Wells Swimming Pool* v. *Rodriguez*, 182 S.W. 2d 824 (Texas); *Younger* v. *Judah*, 19 S.W. 2d 109 (Mo.); *Gaff* v. *Savage*, 210 P. 374 (Wash.); *De La Ysla* v. *Public Theatres Corporation*, 26 P. 2d 818 (Utah); *Horn* v. *Illinois Central Railroad*, 64 N.E. 2d 574 (Ill.); *Coleman* v. *Middlestatt*, 305 P. 2d 1020 (Calif.); *Fletcher* v. *Coney Island*, 136 N.E. 2d 344 (Ohio); *Alpaugh* v. *Wolverton*, 36 S.E. 2d 906 (Vir.); *Grenfeld* v. *Maryland Jockey Club*, 109 Md. 96, 57 A. 2d 335; *Good Citizens Assoc.* v. *Board*, 217 Md. 129, 141 A. 2d, 744; *Drew* v. *State*, 224 Md. 186, 167 A. 2d 331 *Garfine* v. *Monmouth Park Jockey Club*, 148 A. 2d 1 (N.J.); *State* v. *Arent*, 148 S.E. 2d 47 (N.C.), vacated and remanded on other grounds, 373 U.S. 375. There are, of course, other cases. *Western Turf Association* v. *Greenberg*, 204 U.S. 359; *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589; *Brown* v. *Meyer Sanitary Milk Company*, 150 Kan. 931, 96 P. 2d 651; *Brookside-Pratt Mining Co.* v. *Booth*, 106 So. 240 (Ala.), and many more.

The facts in the case at bar are no less compelling than the decisions just cited. With the hope of not being too redundant, respondent again submits that the manager of Blass Department Store had ample valid reason to refuse service in the mezzanine tea room "at that time" to the large group of badge wearing demonstrators. Their mere presence had already drawn a curious crowd (R.47). It was the store's busiest time of the day (R.47). And most important, the rejection of service was the manager's private prerogative.

The crucial and delicate balance of rights has been demonstrated not to be unique. It is comforting to have the knowledge that this Court and the highest courts of the several states have resolved the problem with little effort and amazing consistency. What is truly remarkable now is that there are still some expressions of concern of the correctness and validity of the decisions even in the face of such abundant authority. Before this topic is concluded, it is mandatory to note that the cases relied upon are not peculiar to any one area of our nation designated by some as "slave" states, but enjoy a uniform pattern throughout the several states.

Now, the issue of peaceful demonstrations can be readily met. It is apparent from the record developed in the trial court that to a point, the purpose of the petitioners and their group was fulfilled. No crime was committed by petitioners until they refused to leave the premises after they were ordered to do so by the store manager. It should be obvious that the officials of Blass were not desirous and should not constitutionally be required to furnish facilities for a public forum of marathon proportions. Cf. *Gibonev* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *Marsh* v. *Alabama*, 326 U.S. 501.

IV

The enforcement of Act Fourteen by typical criminal process does not constitute "State Action" and is not otherwise violative of the Fourteenth Amendment.

A. The Mere Aid of State Criminal Process Is Incidental And Does Not Constitute "State Action."

The fact that these cases are the result of criminal prosecutions is of no avail to petitioners. The American system of jurisprudence, without variance, fixes the responsibility of law enforcement on the peace officer, prosecutor, attorney general, the courts, and finally, the public itself. The State of Arkansas is no different and it would not be of any benefit to cite and relate the authorities voicing this fundamental duty. Incipiently, it is imperative to note the case at bar is void of an implementing city ordinance (*Peterson et al.* v. *City of Greenville*, 373 U.S. 244) the announcement of public officials prohibiting demonstrations (*Lombard* v. *Louisiana*, 373 U.S. 267), public property (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715) or state agency regulations (*Robinson* v. *Florida*, 378 U.S. , 12 L.Ed. 2d 711.)

In the instant case, the police officers responded to the plea for assistance from a manager of a privately owned department store. It was their statutory obligation to lend assistance without regard to race, sex, or age. Ark. Stat. Ann. §41-1435 (1963 Supp.), *supra*. In absence of the contrary, good faith of the police officers in the administration of their duties is presumed. *Sunday Lake Iron Company* v. *Wakefield*, 247 U.S. 350; *Barbier* v. *Connolly*, 113 U.S. 27. It cannot be validly argued that the use of police enforcement was a denial of equal protection of the law of petitioners' rights because no such evidence was introduced and, as a practical matter,

the officers did not participate in the manager's decision. *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S.W. 2d 679, cert. den. 352 U.S. 894; *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37; *Snowden v. Hughes*, 321 U.S. 1. The quantum of proof required of petitioners would be that the officers knowingly failed to perform their duties. *Hickinbotham v. State*, 227 Ark. 1032, 303 S.W. 2d 565.

Petitioners wield a double edged sword. They urge that the use of Act 14 is repugnant to the equality clause. This contention too fails, for such a claim "cannot be supported by mere speculation or conjecture." *Hodge Drive-It Yourself Company v. Cincinnati*, 284 U.S. 335, 338.

As a matter of fact, this record sustains a conscientious effort on the part of the law enforcement officials to be fair, impartial, and perform their sworn oaths. Of the thirteen original defendants in the cases consolidated for appeal, the Arkansas Supreme Court only affirmed two of the convictions. *Briggs et al. v. State*, *supra*, 236 Ark. 595 notwithstanding there was ample evidence to sustain the other charges. *Briggs et al. v. State*, dissenting opinion, 236 Ark. 607.

Petitioners actually seek to elevate their "freedoms" to a dual system of justice. In other words, they would have this Court declare Act 14 inapplicable to Negroes but applicable to Caucasians and other races. Conceivably, the same argument could just as forcibly be put to any other crime involving the property of another. Thus, petitioners as Negroes do not in fact ask this Court for equal justice, but for preferential treatment despite justice.

How some would seek, can state action be found in deprecation of inherent rights concerning criminal procedure which offends the Fourteenth Amendment? The answer to such inquiry is the question. A coerced confession tried without the benefit of counsel, and discrimination in the selection of a jury are fundamental violations of due process of law. These doctrines have been espoused hundreds of times by this Court. Others may feel how a tea room should be regulated, but not a one can ignore the fact that the tea room in this case affects interstate commerce and is subject to Congressional monopoly. On the basis of many decisions, it is argued that the law affects interstate commerce and does not tread on due process of law nor does it carry interstate commerce. Cf. *Rountree* v. *Virginia*, 364 U.S. 101. It is no more of a commonly shared belief that a mere [illegible] have recognized an increasing willingness to find State action (*McAuley* v. *Wallace Cotton & Securities Corp.*, 36 Mich. 67, 139 N.W. 2d 337 at 360), but to extend the application of the Fourteenth Amendment and the case at bar would be phenomenal to say the least.

strictive covenant rather than the Negro plaintiff's property right. Brief for Respondent, p. 6, *Barr et al. v. City of Columbia*, 378 U.S. , 12 L. Ed. 2d 766. The principle and undisputed reason for the result reached in *Shelley* was the property rights protected by the Civil Rights Acts of 1866 and 1870. Hence, the unavoidable decision of *Buchanan v. Warley*, 245 U.S. 60. Since *Shelley* and like cases draw their very life from the early civil rights legislation, it is helpful to review decisions made when the legislation was still fresh in the minds of the Court. In *The Civil Rights Cases*, 109 U.S. 3, rendered in 1883 this Court cautioned:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, custom or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual . . ."

With this language foremost, a portion of a sentence from *Shelley v. Kraemer* is worth noting:

> ". . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Earlier, in *United States v. Cruikshank*, 92 U.S. 542, it was stated at 554:

> "Its (Fourteenth Amendment) sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to

> your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of the citizens of other states within your jurisdiction. *Slaughterhouse Cases*, 16 Wall 36, 77." (Emphasis added.)

This interpretation has not been modified. *Colvin v. Hardyman*, 341 U.S. 651; *District of Columbia v. Thompson Co.*, 346 U.S. 100; *Williams v. Yellow Cab Co.*, (3 Cir.), 200 F. 2d 302, cert. den.; *Dargan v. Yellow Cab Co.*, 346 U.S. 840.

Even in the most recent pronouncements [illegible], which have undisputedly enlarged the doctrine of state action, great care has been taken to respect and restrict the operation of the Fourteenth Amendment. *Avent v. North Carolina*, 373 U.S. 375; *Gober v. The City of Birmingham*, 373 U.S. 277; *Lombard v. Louisiana*, 373 U.S. 267; *Peterson v. City of Greenville*, 373 U.S. 244.

Stare decisis is the historical cornerstone of our system of jurisprudence and that time honored doctrine should not now be sacrificed on the alter of a ficticious right to invade private property.

B. The Fourteenth Amendment Alone Does Not Prohibit These Prosecutions.

The brief of petitioners not only attempts to show state action by a criminal prosecution of a trespass statute, but delves even deeper. The petitioners would not only deny a property owner police protection, but would apply the same theory with equal zeal to a civil action for trespass. Thus, a property owner, failing to satisfy the whims of an individual or a group, would not only be left without police protection, but would

have no judicial forum to find and declare his remedies as well. Unquestionably, such a concoction for the protection of the rights of a law violator runs afoul of and thwarts the constitutional rights of others. Again, rises the sinister creation of a dual system of law providing for absolute immunity of Negroes and attendant deprivation of rights of storeowners while subjecting all others to the full force of criminal and civil remedies.

From whence came such a proposition? Where did it evolve? What else would its malignant growth encompass?

Amazingly, petitioners would employ the Fourteenth Amendment to reek such devastation. The argument, simply put, is that the Amendment alone and standing independent of State action would nullify the application of a trespass statute used to deny petitioners service in a restaurant. To foster and engender substance in support of this proposition, some would rely on that famous document which gave birth to this Nation. They would reason that our forefathers by the Declaration of Independence contemplated that Negroes had a right to be served in any restaurant. They would ignore that the authors of the Declaration and the Constitution of the United States held bonded servants and owned slaves. The drafters sought to protect their vested rights. U.S. Const., Art IV, Sec. 2 Par. 3; Art. I, Sec. 2, Par. 3. In answer, it might be said that those provisions were nullified by the adoption of Amendment Fourteen in 1868. It is remarkable, to say the least, that this unique application of the Amendment has only now come sharply into focus notwithstanding that it has existed for almost a century. Jurists have not been blinded for more than nine decades and simply failed to perceive what some would presently read into the Amendment. The fore-

sight and wisdom of those who have interpreted the Fourteenth Amendment were not prohibited by some mystic power from invoking this newly conceived application. The abstinence was both purposeful and meaningful. The words of the Amendment have not changed any more than the rights of those who have lived under it. The Fourteenth Amendment absent state action was uncontrolling in such situations in the past and has no authority today.

Surely the authors of the Fourteenth Amendment did not have such a broad purpose in mind. The legislative history of the Fourteenth Amendment, while misleading to some, does not seem to produce a greater application than the Courts have given it in the past. In this respect, respondent would beg indulgence and permission to rely upon Point IV of the dissenting opinion of Mr. Justice Black rendered in *Bell* v. *Maryland*, *supra*, 84 S. Ct. at 1873—1878.

The cases interpreting and applying the Amendment have not only failed to increase the scope of the Amendment, but have expressly limited it. The courts have held that the Fourteenth Amendment created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws. Thus, Mr. Justice Bradley, in *The Civil Rights Cases*, 109 U.S. 3, *supra*, after quoting the first section of the Fourteenth Amendment, said:

> "It is *state action* of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." (Emphasis Supplied).

In *United States* v. *Harris*, 106 U.S. 629, the Court quoting from *United States* v. *Cruikshank*, 92 U.S. 542 *supra*, said:

> "The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another."

Notice should also be taken of the dissenting opinion of Mr. Justice Black in *Bell* v. *Maryland*, *supra*, 84 S. Ct. at 1868, noting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, *supra*, where these apt words are found:

> "This well-established interpretation of Section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion, forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

Unless respondent has misinterpreted even the most recent opinions of this Court of the past two years, the traditional concept of the application of the Fourteenth Amendment to state action still prevails.

It is submitted that benefits that might be derived by the proposed innovation are more imagined than real, and in any event would destroy more freedoms and rights than it would create. Of lessor importance, hundreds of cases would be reversed and their well reasoned opinions would be replaced by judicial fiat.

V

Act 14 is not Vague or Indefinite.

The third principle topic discussed in petitioners' brief is that the convictions violated due process of law because Act 14 is vague and indefinite. This Court has, on many occasions, set forth the standards and guides to be used to reach and determine if a statute is clear and understandable. *Lanzetta et al* v. *New Jersey*, 306 U.S. 451; *Screws, et al* v. *United States*, 325 U.S. 91 (1945). No useful purpose would be served to reiterate that criteria here.

The crux of petitioners' argument in the Arkansas case appears to be a condemnation of the word "premises." To assure proper connotation, respondent deems it beneficial to quote the enactment. Now codified as Ark. Stat. Ann. §41-1433 (1963 Supp.) Act 14 provides:

> "Any person who after having entered the business premises of any other person, firm, or corporation other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment. [Acts 1959, No. 14, §1 p. 29.]"

There is no question that the act clearly, and concisely declares what constitutes a criminal trespass in unequivocal terms and ordinary language. The Supreme Court of Arkansas, in its decision, had no difficulty resolving the contention of vagueness made by petitioners below. *Briggs et al* v. *State*, *supra*, 236 Ark. at 602. There, it was stated:

> "The Act clearly, specifically, and definitely makes the failure to leave the business premises of another, upon request of the owner or manager, a misdemeanor."

The Arkansas Court was not required to indulge in interpretation, but simply and easily paraphrased the statute.

An effort is made by petitioners to parallel Act 14 with the recent decision of *Bouie* v. *City of Columbia*, 378 U.S. , 12 L. Ed. 2d 894 (1964). However, a perusal of that case reveals no reasonable analogy. First and primary, Act 14 requires no forewarning as did the South Carolina trespass statute considered in *Bouie*. Act 14 has but two essential elements: (1) Refusal to depart from the business premises of another; (2) Upon request of the owner or manager of the Business establishment. Cf. *Wright et al* v. *Georgia*, 373 U.S. 284 (1963). This court has approved more indefinate language. *United States* v. *Alford*, 274 U.S. 264 (1927). Moreover, as previously shown, Act 14 truly amounts to no more than a codification of the common law of the owner's inherent right to eject persons. Even if the basis of Act 14 was not the common law, who would argue that abrogation by statute is improper?

Aside from the legal authority, the factual aspects of this case are even more compelling. Act 14 was not a legal snare contrived by the State of Arkansas, police officials, or Blass to trap petitioners in criminal trespass. One previous demonstration involving a group of more than fifty demonstrators had been staged almost a month earlier. The necessity of counsel had obviously been foreseen, legal ramifications anticipated, and preparations completed. It is more than happenstance that the same eminent counsel appearing here have represented

other demonstrators all over the United States. One petitioner, Robinson, had gained such notoriety that he was recognized immediately as he entered Blass store with a group of demonstrators, by a patrolman. It is agreed that the Constitution is not color blind and most assuredly, those who interpret it should not feign inability to perceive the dedicated, organized, and concerted effort of petitioners to violate and bring focus on a particular criminal act.

It would be incredible to conclude that petitioners were ingenously ignorant of their status and the law. As in *Bell* v. *Maryland* and many other cases recently reviewed by this Court, showing an organized effort of national scope, petitioners purposely "courted arrest." 378 U.S. , 84 S. Ct. at 1868, dissenting opinion.

The brief for petitioners on this point, cleverly and in good taste humor, has created hypothetical situations to point up ridiculous applications of Act 14 to "leave the pickles" or "the ribbon counter." (pp. 75, 76 of Petitioners' Brief) Fortunately, the glibness of the brief cannot alter the language of Act 14 nor the conclusive record made in this case. Although petitioners denied their admissions, police officers testified that both petitioners acknowledged that they had refused to leave the premises as requested by the manager (R.28,33,40). The petitioners devote a paragraph with three references to the record to illustrate that they were only asked to leave the lunch counter or tables but the record is replete with testimony to the end that petitioners were, in the words of the statute, requested to leave the premises (R.28,30, 33,40,42,44). At least some of the group understood the request and left the business premises, for only the petitioners were discovered after the store manager had returned to the store with the police officers.

Finally, petitioners argue that a refusal to leave the premises for two and one-half minutes has utterly "ludicrous results." The reference to time, is at the least, misleading. It is true that there is some disparity of the time involved. One of the petitioners fixes his entrance into Blass at 11:35 a.m. (R.54,60). The store manager substantiated this to some degree (R.47). First, Mr. Trianfonte was notified, then observed the disturbance of the group talked with them, and shortly notified Mr. Holt, the store manager (R.42, 44). The store manager then came to the mezzanine, where they both undertook to encourage the group to leave without a disturbance because they were unprepared to serve them at that time (R.50). After having a similar conversation with several of the demonstrators, Mr. Holt was required to leave the store to find police officers across the street at Worthen Bank & Trust Company (R.46, 47). It was not until their return to Blass that petitioners were apprehended and questioned. It is thus readily ascertainable that there had been a lapse of about thirty minutes from the commencement of the demonstration to its conclusion (R. 30). There had at least been a lapse of about five minutes while Mr. Holt was gone (R.47). Surely, petitioners will admit that they remained on the mezzanine in defiance of lawful order of the manager for a considerable time and apparently did not intend to leave the store immediately. At least, one court has held that demand to leave requires immediate obeyance. *Crouch v. Ringer, et al.* 188 P. 782 (1920), 9 ALR 374. Surely, the circumstances here would not dictate otherwise. It must be remembered, that had petitioners made any reasonable effort to comply with the request of the store manager, they would have exercised their peaceful persuasion demonstration, would not have been arrested, and would not be before this Court at this time.

CONCLUSION

The consideration of these two prosecutions for the crime of trespass should not turn on what some may consider a national moral issue. The Civil Rights Act of 1964 has to a significant extent resolved this. The issue here is of an overriding fundamental nature which could sever the very roots of this country from the nutrition of individual choice and use of private property.

The pressures are great; the burden is heavy. This Nation of individuals awaits a decision. A determination adverse to respondent would be a calamitous breach of what our forefathers conceived as an impregnable fortress of individual freedoms. Such a mandate would provide a smooth avenue to the systematic destruction of all the scared rights heretofore considered to be inalienable.

These are only some of the consequences of absolving petitioners of their premediated acts. Nothing need be said of what new tact petitioners will take if given the blessing and immunity of a favorable decision.

Respondent prayerfully urges that the contentions of petitioners be rejected and the lower court affirmed.

Respectfully submitted,

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